No. 15267

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For The Ninth Circuit

PERCY HOOD and GRACE HOOD, His Wife,
Appellants

vs.

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Appellee.

Brief of Appellants

Appeal from the United States District Court for the Western District of Washington, Northern Division

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RECORD—FERNDALE

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JURISDICTIONAL BASES.

This is an appeal from a decree of the United States District Court for the Western District of Washington entered upon a counter claim of the there defendant, the United States, appellee herein, against the appellants, Percy Hood and Grace Hood, his wife, foreclosing a claimed lien against certain land owned by them, and, in effect, denying the prayer of the complaint that their titles thereto be quieted against such claim of lien.

By its Act of March 18, 1926, 44 U. S. Stat. 211, hereinafter referred to as the "*Diking Act*" or "*the Act*" Congress authorized an appropriation for and construction of dikes for the declared purpose of "*reclaiming about* 4000 *acres of land*" in and adjacent to the Lummi Indian Reservation in Whatcom County, Washington. This Act purported to "*create*" ipso facto, liens against lands to be "*benefited*" which might be in "*Indian ownership*" and provided for and purported to require the obtaining of liens by contracts with owners of land in "*private ownership*", all in favor of, and to secure reimbursement to, the appellee for such construction costs. Such costs, were under the Act, to be "*equitably distributed*" to "*the lands*" according to the "*benefits*" to the respective tracts comprising such "*lands*", and the extent and details of such liens were to be set forth in a "*public notice*" to be given by the Secretary of the Interior.

The full test of the Act appears in Appendix I and II.

Owners of seven tracts of land within the confines of the Reservation, including appellants, joined in bringing this action against the United States in the Superior Court of the State of Washington for Whatcom County. Their complaint (Tr. 5-31) alleged that the "*ownership*" of each of the tracts was "*private*", and that no lien contract, affecting the lands of any of them had ever been executed but that not withstanding such facts, the United States, by means of such "*public notice*" in 1930, and by other means, has continuously claimed to have such liens thereon, and prayed that their several titles be quieted against such claims.

Sovereign consent to such action was there pleaded, and is here asserted, to be found in 28 USC 2410 (a) providing that the United States

> "may be named a party to a civil action or suit in any district court, including the District Court of the Territory of Alaska, or in any State court having jurisdiction of the subject matter, *to quiet title* to or for the foreclosure of a mortgage *or other lien upon real or personal property* on which the United States has or claims a mortgage or lien."

Since this statute is merely a "consent" statute (see Wells v. Long, 162 F. (2d) 842) jurisdiction of the subject matter must be found independently of it. All of the asserted liens were less than the $3,000.00 minimum required for initial federal jurisdiction; therefore the action was filed in the state court. However after due service of process the appellee removed it

to the District Court below, under authority given by 28 USC 1444, which provides that "any action brought under section 2410 may be removed to the United States District Court" for the district in which the state court is located.

Those allegations of the complaint bearing on the manner by which the alleged liens were asserted and the titles of the several plaintiffs clouded were common to all of them. But as the nature or state of the ownership there were allegations distinctive to the land of appellants, the Hoods. Although all of the tracts were originally reservation lands, which had been anciently allotted to individual Lummis, those of the non-Hood plaintiffs, it was averred, had come by mesne conveyance into "private" (and non-Indian) "ownership" long prior to the passage of the Act.

This was not denied by appellee. Answering separately as to those plaintiffs (Tr. 38) the United States simply denied that it claimed any such lien, and that since consent to sue the sovereign was limited (so said its answer) to instances where a lien was being claimed, there was here no jurisdiction. But on that issue of fact the court below found for those plaintiffs, and by its decree quieted their titles. From that portion of the decree there has been no appeal.

As to appellant's land, however, the complaint charged that the United States claimed that it held an auto-

matic lien under the Act because the lands were in "Indian ownership" of record at its effective date. Ad-

mitting that while record title was then being held by divers Lummi Indians the complaint made various charges the effect of which, the appellants asserted, was to deny and obviate any lien claim. Among these, was the history of the acquisition of their titles. While these details are more appropriately developed later herein, suffice it now to say that essentially they charged that the United States itself, pursuant to law and its own regulations and as agents for the Indian owners (heirs of the original allottee) had four months prior to the enactment of the act procured the appellants to contract to purchase said lands under a "Memorandum of Sale" (Tr 28-30), and to pay (without right of withdrawal) in full therefore in cash and notes. The complaint pleaded that these facts (and others) caused the later delivery of the fulfillment deed which had been dated simultaneously with the "memorandum" to be deemed to relate back to its date of execution, and to have created in appellants an equitable title, and to have estopped the appellee from asserting the lien, and that appellants had such interest or title, or in any event the Indian heirs themselves had a fee title, both of which were guarded by the due process clause of the Constitution from any arbitrary and automatic lien such as the Act purported to effect. Other attacks on the claim of the lien were alleged.

Appellee separately answered these allegations (Tr.

39-45), admitting most of the factual statements, and that it claimed as valid the very lien which the complaint charged was wrongfully asserted. Appellee also filed and served upon appellants a counterclaim and summons thereon (Tr. 45-50), which, with appellants answer thereto (Tr. 50-59) raised the same issues as did the complaint and the last aforesaid separate answer thereto, and which alleged the sum due under the alleged lien to be $1830.24, and prayed foreclosure of the lien to produce payment thereof. The decree appealed from is based on, and sustains, the counterclaim. The issues under it, being identical to and arising out of the same transactions as those in the complaint, were clearly ancillary to the original jurisdiction over the complaint. See Barron and Holtzoff, Fed Prac., and Proc. Vol. 1, Sec. 23.

By 28 USC 1291 this court is invested with jurisdiction to review "all decisions" of the district courts.

STATEMENT OF THE CASE

Trial was had upon the pleadings outlined above, which as to the issues in this appeal, were upon those portions of the complaint relating to the lands of the Hoods, the separate answer thereto, the counterclaim against them and the answer thereto. Findings of fact were specially made which are reflected in the facts above stated. The slight extent to which appellants might except to them did not justify review here and they stand unchallenged on this appeal. From

them the Court made conclusions adverse to appellants, and the central question is whether, under these facts and pleadings any valid lien was created by the Lummi Diking Act. For Full text see appendix.

This act classifies the lands to be affected by the project as lands in "Indian ownership" and "private ownership", and purports to distribute the costs equitably to all the lands. As to the former, Section 2 of the Act provides that:

> "The construction charge properly assessable against the Indian lands shall be reimbursed to the Treasury of the United States under such rules and regulations as the Secretary of the Interior may prescribe, and there is hereby created a lien against all such lands, which lien shall be recited in any patent issued therefor, prior to the reimbursement of the total amount chargeable against such lands."

Section 3 would require repayment contracts from the owners of lands in private ownership.

The issues are thereby narrowed at the very outset. The only lien sought by or pleaded in the counterclaim (Tr 47-49) or adjudged by the decree appealed from, is the automatic, unilateral and arbitrary one which the Act attempts to impose, and to impose only, on lands in "Indian ownership." There is no question of a contractual lien, and to sustain such a statutory lien the United States must establish that at the time the liens created by the Act (if any were) became effective the lands were in "Indian ownership"; more than that, that the lands were not then "in private ownership" because as

we shall show later the two terms are not just the converse of each other.

So then, the following subsidiary questions arise, all of them raised by the pleadings, and reflected in the findings, proposed conclusions and motion for new trial, namely—

1. At the time of passage of the Act had the process of acquisition of title by the appellants gone so far

   (a) that as between them and appellee their interests, under the doctrine of equitable conversion had become equivalent to legal title.

   (b) that they had acquired any property right or interest in or in respect to said land, and with respect to which the imposition of such a lien would offend any constitutional rights.

2. Even if any such title or interest of the appellants were to be eliminated from consideration, and the title deemed for the purposes of this case to be in the Indian heirs (grantors to the Hoods), with their right of alienation dependent upon the consent of the United States, was the nature of their title such as to be from such a lien protected by the requirements of due process or otherwise constitutionally immune from such a lien.

3. Did the approval of the "Memorandum of Sale" by the Secretary of the Interior some months after the passage of the Act, and of the escrowed deed relate back to the dates thereof, well prior to the Act, as against the United States and its claim of lien.

matic lien under the Act because the lands were in "Indian ownership" of record at its effective date. Ad-

4. Was the United States estopped by its solicitation of the sale to the Hoods, or by any of its transactions with them respecting this land prior to the Act, or, by such matters in any manner, barred from claiming that it retained as against them arbitrary legislative power to impose the lien and thus alter the effect of the contract of sale and force a breach of the covenants respecting good title.

5. Does the proper interpretation of Section 2 of the Diking Act limit the classification of lands "in Indian ownership" to those not yet "patented" by the United States, and hence exclude the Hood lands, which had long since been patented.

6. Even if the claimed lien for construction charges for the dike be sustained, did the lien embrace charges for operation and maintenance?

SPECIFICATION OF ERRORS

These questions are reflected in the following specifications in which, we respectfully urge, the trial court erred:

1. In adopting its Conclusion III (Tr. 74) holding that the lands of the Hoods is Indian land within the meaning of the Diking Act.

2. In adopting its Conclusion V. (Tr. 74) that notwithstanding that the "Memorandum of Sale" was made by the Hoods and the Indian agent in November, 1925, four months prior to the Act, and the deposit with the Indian agent of the full consideration, and the subsequent acts done in completing the transaction

as shown in Findings VII, VIII, IX and X Congress had the power to subject the land to the involuntary lien created by Sec. 2 of the Act, and that such lien covers the operation and maintenance charges through successive years as well as construction costs.

3. In refusing to conclude (Tr. 76) that equitable title to the lands of the Hoods passed to them upon the execution of the "Memorandum of Sale" and payment of the purchase price in cash and notes, under the doctrine of equitable conversion or otherwise, and that such title could not be, and was not impaired by the Diking Act.

4. In refusing to conclude (Tr. 76) that the approval of the Secretary of Interior to said "Memorandum of Sale" and the "Indian Deed of Inherited Land" to the Hoods, given subsequent to the Act related back to the dates they bore, Nov. 10, 1925, prior to the Act.

5. In refusing to hold that (Tr. 77) the quality of the title of Mary Yahimaloo, the original patentee of the Hood land, and of her heirs, was in fee simple despite the restriction on their rights of alienation.

6. In refusing to hold that (Tr. 77) the title of the Indian grantors to the lands which they sold to the Hoods was such that the said lands was not "Indian Lands" but "Lands in Private Ownership" within the meaning of the Act.

7. In refusing to hold (Tr. 77) that only liens (other than contractual liens) authorized or created by the

Act were those provided in Section 2 thereof against Indian lands which had not yet been "patented", and could not and did not affect the Hood tract, the same having been "patented" long prior thereto.

8. In refusing to hold that (Tr. 77) the title of the Indian heirs, to the lands conveyed to the Hoods, being a fee title, could not constitutionally be subjected to the involuntary lien sought by the Act in that in so doing due process would be ignored, and if construed to intend such a result would be unconstitutional and void.

9. In refusing to hold (Tr. 78) that in the proceedings relating to the sale of the property to the Hoods, the United States was acting as agent for the then Indian owners, and in its actions throughout such proceedings, and particularly in procuring the Hoods to sign the "Memorandum of Sale" and at the same time submitting to them, and accomplishing the execution of the Indian deed to the Hoods containing a warranty of title, the United States was estopped to promote and enforce the lien of the Act, the effect of which would be to force a violation of the warranties as to title in said instruments, or that in any event or was otherwise equitably barred from so doing.

10. In holding (Tr. 75) that the lien, in any event, covered operation and maintenance as well as construction charges and in refusing to hold (Tr. 85, par.

B) that the former were not covered.

11. In decreeing that appellant's lands were subject to the lien, and failing to quiet their title.

ARGUMENT AND AUTHORITY

PRELIMINARY MATTER AND SUMMARY

Consideration of the issues posed by the foregoing questions involves inquiry into the nature of the relationship of the United States to the Lummi Indians, and particularly to the Indian "owners" of the lands herein involved and the quality of their ownership, and the kind and extent of the rights and duties of the United States to them, and the effect thereon of the Diking Act of March 18, 1926.

The historical background and pertinent facts are fully developed in the pleadings and set forth in the Findings of Fact (Tr. 62-73), those particularly referring to the lands involved in that part of the original case here appealed being Findings VII to XII, inclusive (Tr. 68-73)*1. Essentially they show that by treaty of January 22, 1855 between the United States and the Lummis and other tribes what is now known as the Lummi Reservation was set aside to that tribe, and that under powers contained therein President Arthur on December 31, 1884, pursuant to a previous allotment gave and granted the tract here involved to Mary Yahimaloo "to have and to hold to her and her heirs forever", subject to the same terms contained in a previous treaty with the Omaha Indians,

*1 For full text see appendix, v. - ix.

which among others restrained the grantee and her heirs from alienating the same except on certain conditions. It was conceded that Congress had later legislated to permit alienation upon request of the owners with the consent of the Executive branch, and set up procedures governing the giving of such consent under which it in effect acted as agent for the owners in procuring sales by bids and negotiations, (Findings VII, Tr. 68-69, Appendix V.)

Sometime prior to the fall of 1925, such procedure had been instituted at the request of numerous heirs of Mary Ya-him-aloo, the then "owners" of the land and when no bids were forthcoming, the Commissioner of Indian affairs suggested to Mr. Hood that he make an offer, which he did, resulting in the execution of the "Memorandum of Sale" made and dated November -10, 1925 (for full text see Tr. 28 and see also Findings VII., app v. Tr. 69). There is nothing tentative about this instrument. It reflects a fully executed agreement. It recites that the Hoods had "purchased" the property for $10,100.00 and had paid one-fourth ($2525.00) thereof in cash and executed four equal promissory notes for the remainder, payable consecutively and annually, and it then "witnesseth" unconditionally that "upon payment in full . . . then in such case a deed duly executed by said heir . . . *and approved by the Secretary of the Interior*, shall be delivered to (the

Hoods) conveying said land to them and their heirs pursuant to law." Then followed provisions giving said Secretary the option (but not requiring its exercise) in the event of non-payment of forfeiting the contract and retaining 25 per cent of the total price as damages. It further provided that "the deed" so mentioned should be retained in escrow by the Commissioner until payment in full and then be delivered to the purchaser.

This was signed by W. F. Dickens, Superintendent, and the Hoods, and concededly was on a form prepared by the Indian Bureau. It was stamped — "approved" August 10, 1926 by the Assistant Secretary at Washington. Coincidentally, on a Bureau form there was prepared by its officials, (Finding VIII, Tr 70, and for full text see Tr. 31) the "Indian Deed of Inherited Land", which thereafter, and upon final payment (prior to the maturity of the notes) was delivered to the Hoods and through which their legal title is derived. It recites the names of all of said heirs, as parties of the first part, and the Hoods as parties of the second part, and then:

> "Witnesseth, That said parties of the first part for and in consideration of the sum of $10,-100.00 in hand paid . . do hereby grant, bargain, sell and convey unto said party of the second part . . . (the premises involved herein) . . And the parties of the first part, for themselves and their heirs, executors and administrators, do here-

> by covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that they will forever warrant and defend said premises against the claims of all persons, claiming or to claim, by, through or under them only".

This was executed and acknowledged by all 23 adult heirs at various times on or before January 16, 1926. It was signed also by "Walter F. Dickens, Legal guardian for" four named minors, and acknowledged by him as such guardian on June 28, 1926, and was also approved (Finding IX, Tr. 72) on August 10, 1926 by the Secretary (see also app. vii.)

The interest of the minors gave title concern. Therefore said agent, Dickens, procured himself to be appointed their Guardian in the state probate court, and in such probate cause obtained authority to and did sell their interests to Percy Hood, the consideration being the product of the ratio of their interest to the whole applied to the total purchase price, and which was taken out of it, at least the Hoods paid no separate additional consideration, (Finding IX, Tr. 71-72). The return of sale by said Guardian in the probate court referred to the sale as having been made March 8, 1926 but did not specify any date but the order of confirmation was entered on June 4, 1926. Thereafter said "memorandum" and "deed" were sent to Washington and approved as above stated. There can be no doubt that the probate procedures were the cause

of the delay in the formal approval of these instruments by the Secretary.

In summary, the arguments on these facts are:

1. That the title of the Indian heirs was in fee simple and their rights, as absolute owners, to be distinguished from Indians holding under "Trust patents."

2. That the lands here involved were either free from the automatic lien of the Act under its express terms or such attempted lien was unconstitutional or void.

3. Separately from the constitutional question, the lien did not arise because the effective dates of the memorandum of sale and the Indian deed to the Hoods were their recited dates of November 10, 1925 prior to the passage of the Act, because:

A. The memorandum, upon its signing, constituted a presently existing executory contract; B. the Hoods acquired an equitable title to the property under the doctrine of equitable conversion on said date; C. under the doctrine of relation back, the efective date was the recited date;

4.At the very least, the appellants had vested property rights prior to the Act which the purported lien under the Act would impair contrary to due process. 5. In any event there is no lien under the Act for operation and maintenance. That all these points are reflected in the specifications of errors is obvious.

THE INDIAN LAND WAS IN FEE SIMPLE

This has long been decided by both the federal and state courts in this jurisdiction. The record source is the patent to Mary Yahimaloo set out in full as an exhibit to the complaint (Tr. 25) and incorporated by reference in Finding VII (Tr. 68), and dated December 31, 1885. It was given pursuant to the Treaty made January 22, 1855 with the Lummi and other Indian tribes between Governor and Indian Agent Isaac Stevens and ratified by the Senate on March 8, 1859, and found in 12 U. S. Stat. at Large, 927. The provisions pertinent to the title question, as shown by the recitals in the patent, in turn were incorporated by reference from the Treaty with the Omahas, (10 U. S. Stat. at Large 1044) and set forth in the opinion in Bird v. Winyer, 24 Wash. 269, 74 Pac. 178.

In view of the unanimity and wealth of opinion on this point it does not seem appropriate to burden this brief with the somewhat lengthy text of that treaty. Suffice it to say that the Lummi Treaty gave the President (as the patent itself in haec verba recites) authority

> "at his discretion, to cause the whole or any portion of the (reservation) . . to be surveyed into lots and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms as are provided in the Sixth Article of the Treaty with the Omahas"

and the latter treaty further authorized the President

after any such permanent location had been made to "issue a patent to such person or family . . " conditioned on certain terms against alienation, and providing further, in substance that, if after the issuance of the patent the patentee neglected or refused to occupy and till such lands, and "rove from place to place" the President might cancel the patent. The patent then reads: "The U. S. has given and granted and . . does give and grant unto . . Mary Yahimaloo and her heirs . . (said land). To have and to hold . . forever".

So in Bird v. Winyer, while holding that this "was simply a defeasible title" the court further held (somewhat inconsistently, we think) that the patentee received only the right to possession and occupancy. But four years later, the same court in Guyatt v. Kautz, 41 Wash. 115, 83 Pac. 9, held that this was obiter, and followed the decision of Judge Hanford in Ross v. Eells 56 Fed. 855 and United States v. Kopp, 110 Fed. 160 in holding that neither the restrictions on alienation or the provisions for cancellation deprived the patentee's title of the quality of an estate in fee simple, citing Kent's Commentaries to classify it as a "qualified, base or determinable fee" . . which may continue forever," and which make it inheritable and a fee. This view was confirmed in Prichard v. Jacobs, 46 Wash. 562*1, and on appeal therefrom in Jacobs v. Prichard, 232, U.S. 200, 56 L.Ed. 405, 32 S. Ct. 287, and again in "In Re Little Joe's Estate," 165 Wash. 628, 5 P. (2d) 995. While the earlier cases were not based on the Lummi Treaty, the opinions disclose that the terms of the treaties therein involved were as to this issue identical and in the last named

*1 90 Pac. 922.

case it was the Lummi Treaty (though with one of the other tribes) that was passed upon. Clearly such is the long established rule in Washington.

Under other similar patents and treaties the United States Supreme Court has ruled likewise; Libby v. Clark, 118 U.S. 250, 6 S. Ct. 1045, 30 L. Ed. 133 and Lykins v. McGrath, 184 U. S. 169, 46 L. Ed. 485, 22 S. Ct. 450.

We cannot overemphasize the basic importance of this holding to this appeal, as will appear infra; also because without an awareness of the distinction between this fee simple ownership under these local treaties as compared with the tenure under some of the later arrangements it is easy to be led astray as to the extent of the government's power over what is sometimes loosely called "Indian Lands", and in the Diking Act, as we submit, in the use of the phrase "Indian ownership."

As is said in 27 Am. Jur. 547 (Indians, Sec. 9)

> "Until 1871, Indian tribes were recognized by the United States as possessing the attributes of nations to the extent that treaties were made with them. In that year, however, Congress, by Statutes declared its intention thereafter to make the Indian tribes amenable directly to the power and authority of the laws of the United States by the immediate exercise of the legislative power over them, instead of by treaty."

But the same text (p. 548, Sec. 10) goes on to say:

> "A treaty with an Indian tribe has the same force and effect as a treaty with a foreign na-

> tion. It becomes a part of the law of the land . . . The Federal Government is bound to carry out the obligations of such treaties in the same manner as an individual would be bound, *and Congress cannot impair rights vested under these treaties.*"

And on page 551 (Sec. 15) the same text continues:

> "*The protection guaranteed by the constitution of the United States to the ownership of private property extends to individual property held by an Indian; his private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, subject to the guardianship of the United States as to his political and personal status,*"

citing numerous cases. It seems to us that these propositions are self-evident and need no further substantiation.

But, as before suggested, caution does need to be exercised to distinguish decisions based upon rights acquired under the policies consequent to the change noted in 1871 from those private rights under prior treaties. This need is heightened by the use of similar terms in both the prior and subsequent arrangements with Indians. Particularly is this true of "allotments". There is no doubt, 27 Am. Jur. 555, that the fee of the lands in the original occupany of the Indian tribes has from the formation of its government been vested in the United States, in trust for the Indians, and that when reservations were created, the rights the tribes acquired thereto were merely the perpetual right of occupancy, except as modified by treaty, as in this in-

stance by the treaty right of the President to "allot" parcels in fee. There can be no question but that from the very necessity of the case, and as "sanctioned" by long-continued "legislation" the United States has exercised what is called "plenary" power over Indians generally, and over lands yet tribal.

Under this power, and as a political power not to be restrained by the judiciary, but exercised solely by Congress, "allotment laws were passed, commonly authorizing the assignment of particular tracts to individual tribal members, for a term of years but continuing to reserve the fee title in the United States in trust for the allottee, during which time it was inalienable. It has been held that thereunder Congress retained jurisdiction and control over such lands even to vary, even enlarge, the period of inalienablity. These are referred to as "trust patents." In its brief to the trial court below, the United States recognized the distinction between the status, and attendant rights, of such "allotments" and those under fee simple grants.

Because the circumstances of the particular cases passing on the plenary power of such trust patents or allotment in no way brought into view the fee simple patents there are expressions in them tending to broad generalizations as to the extent of the plenary power over allotments. Perhaps the largest extent of the exercies of such powers is reflected in Cherokee Nations v. Hitchcock, 187 U.S. 294, 47 L. Ed. 183, 23 S Ct. 115, but the lands there involved were limited to "tribal lands", as the court was quick to note.

Although only a district court (of Washington) case Eastman v. U. S. 28 F. Suppl. 808, illustrates what we have said. The court there enjoined the Indian Bureau from enforcing its attempts by regulations to restrict the manner of cutting and sale from Indian allotments, holding that the right to cut timber is an incident of ownership and "any *act which excludes the allottee from the full enjoyment of the timber is an interference with the right of ownership.*" The confusion noted above between fee holdings and trust patents seems there to be involved, for the court said:

> "Certain it is . . . that the Government under the supervisory power it may possess, *while it is holding the naked legal title in trust for the Indians* cannot deprive them of the full use of the timber upon the land, absent a specific statutory authorization, or reservation of powers in the certificate of allotment"; but also went on to say:
> "Granted that the Secretary might refuse his consent to an improvident sale by an individual allottee, there is no warrant in this section (of the particular statute which was claimed to justify the regulations) for a policy of timber conservation, *which no matter how laudable and socially beneficial, does in fact diminish an Indian Allottee's full enjoyment of his fee*, as a matter not limited by allotment or by law. The only limitation in the allotment relates to alienation."

Here the court in the same breath calls the allottee's holdings a "fee" and contradictorily says the naked legal title is "in trust". It implies (by way of dictum) that "a specific statutory authorization" might have permitted the regulation while title was under such

trust. If in the second quoted portion above it also meant to imply that a statute could likewise impair the fee, we submit that the court must have overlooked the distinction. In short, the court came to the right result by wrong reasoning, in that it implied there was plenary power over trust allotment but that either a reservation of power in the allotment certificate or an act of Congress was required to authorize its application and since neither was shown to exist the attempted exercise was void, whereas it should have said that since there was a fee, (and as it did say, a fee was invulnerable) no such power was, or could have been, given.

In our own search we have found no decisions extending so far as to subject the rights of fee patentees to any such plenary power nor to contradict the rule above stated that these are no more subject to impairment than the rights of other fee owners. In short, fee ownership is fee ownership, whether held by an Indian or anyone else, and it seems that in these days of sensitiveness to discrimination with respect to civil rights that the proposition must be deemed elementary.

THE LANDS HERE INVOLVED WERE EITHER FREE FROM THE AUTOMATIC LIEN OF THE ACT UNDER ITS EXRESS TERMS OR SUCH ATTEMPTED LIEN WAS UNCONSTITUTIONAL AND VOID.

Under the Act there are only two methods by which

a lien could arise; (1) either under a contract signed by an owner of "land in private ownership"—which would be voluntary; or (2) involuntarily, ipso facto the Act, and only upon "lands in Indian ownership." Thus, if there is neither a contract and the land in question is privately owned, there can be no lien.

There was here no contract, whether by the Hoods or by the Indian heirs, either pleaded or shown. By its counterclaim the United States rests its case on the theory that the lands were in Indian ownership. It does not say so in express terms but that is the only possible purport of their allegations (Tr. 47-48) that the "restricted patent left the underlying fee in the United States", and that "at the time of the effective operation of the memorandum of sale and the deed to the Hoods the land in question was subject to the provisions of the Act.

Let us assume, but only for the sake of the present argument (because we strenuously contend to the contrary infra this brief) that the Hoods had no right of property of any kind at the date when the Act became operative. Title then must certainly have been in the Yahimaloo heirs. When we thus test the appellee's position we find it in a dilemma which we believe insurmountable.

The United States then must in order to sustain its claimed lien (1) either pursuade us that the title of the heirs was not in fee simple and thus deny the authorities cited in the foregoing section of this brief

and that "fee simple" title is something else than "private ownership", or (2) that if it does mean what it has always meant, and the heirs were private owners, that because they were Indians their property is subject to completely arbitrary control by Congress and that due process as to such an Indian owner is purely ephemeral. We have already disposed of the first horn. That the second is impossible, and contrary to the safeguards of the Fifth Amendment is the thesis of this section of the brief.

But even before we reach the constitutional dilemma the appellee has a further impediment to meet. The very sentence of Section 2 which *"creates a lien"* against Indian lands, goes on to provide that such lien "shall be recited in *any patent issued therefore*". In this case the patent had been issued some 40 years or more when the Act was passed. The United States could not thereafter issue a patent on the land. It had no title to grant by patent. The fee was in Yahimaloo heirs.

It is fair to assume that this Act was drawn by the Indian Bureau itself, certainly it is inconceivable that it could have passed Congress without its knowledge and participation since obviously the construction work was to be done by it and the Secretary of the Interior was to administer it. That being so, we may properly assume that the words of the text were used advisedly. It follows that "Indian lands" as used in the Act could not include lands already patented. This,

of course, is perfectly consistent with the necessary consequence therefrom; namely, that patented lands owned in fee by Indians are just as much within the meaning of the Act itself "private property" as lands owned by white persons. It is significant that in the Act there is no distinction based upon the race or ownership, except that implied by the word "Indian". We must assume that no racial discrimination was intended, and that *if an Indian privately owned* land he was entitled to the same treatment as a white owner.

There is no necessary showing that such an interpretation leaves Section 2 with nothing to operate on and meaningless. For aught that appears there might have been unpatented land within the Lummi Reservation, that is to say, tribal land, as to which the United States retained plenary power, by which to impose the lien. Thus by the very language of the Act, patented lands cannot be in "Indian ownership", and are therefore not subject to the lien.

Consider now the second horn of the dilemma. If "Indian lands" embrace such fee simple titles as the Yahimaloo heirs owned how can the Act survive constitutional attack? We have said, and we repeat, under the authorities in the previous section of this brief, the private rights of Indians are fully as sacred constitutionally as those of any other person. That being so, where does the United States find due process in the attempted imposition of this lien?

We here note U. S. v. Eastman, supra and urge the comment made thereunder.

We do not stop here to examine the question, although we doubt whether the United States has such power over land within the reservation as would, against private owners therein, give it the power (even if properly exercised with regard to due process) to impose improvement liens. It is sufficient here to say that if such power did and does exist there is clearly no constitutional exercise of it shown in the Act.

Due process requires notice and the opportunity to be heard. With respect to such improvements as drainage and reclamation the rule is:

> "it is essential that before a special tax or assessment can become a fixed or permanent charge on the property of an individual, due process of law requires that he must have notice of it, and some opportunity to contest its validity and amount. When an improvement district is not created by the legislature, and there has been no legislative determination that the property included in the district will be benefited, it is unquestionable that property owners must have notice and an opportunity to be heard on the question of benefits, but is is equally true that such notice and opportunity to be heard are not essential when the legislature itself has determined what property can be benefited or has laid down fixed rules by which the benefits may be determined", 16 A. CJS 1042.

And in 48 Am. Jur. 693, it is said:

> "That where the legislature does not of itself act in determining an improvement district or

> area or in making a special or local assessment, but delegates the power to do the same to some subordinary body, due process of law requires that at some state of the proceedings before the assessment becomes irrevocably fixed the property owner shall have opportunity to be heard, of which he must have notice. Under this rule it matters not, upon the constitutionality of such law, that the assessment has in fact been fairly apportioned. The constitutional validity is tested, not by what has been done under it but what may, by its authority, be done.

The Act clearly fails to meet these tests. The area is not defined. The mere statement that its purpose is to reclaim "approximately 4,000 acres within and adjacent to the Lummi Reservation" is not notice of what the exact boundaries are. Apparently (for the Act does not itself otherwise specify) this important matter is left to the uncontrolled discretion of the Secretary of the Interior. Further the Act clearly contemplates a variation in assessment; it directs the Secretary equitably to distribute the total cost "in accordance with the benefits received". Thus any property owner, even without his knowledge, by decision—whether correct or not—of the Secretary, may have his land included in the district so long as it is "in or adjacent" to the Reservation, and once included has no voice, even of protest, as to ratio of costs may be imposed upon it.

So clear is it that due process is there infringed that we deem it unnecessary to examine cases in detail.

It has been said many times by the courts that the views of executive agencies of the United States, and this is particularly true of Indian affairs, are persuasive as the existence and extent of rights claimed to be given by legislation. Here there is overwhelming evidence in the record that the Bureau itself never believed the Act was valid to impose the liens, ipso facto the law, upon lands held under such restricted fee patents as was given Mary Yahimaloo. Finding X, (Tr. 72) * states that the Secretary, in making his "Schedule of Charges" classified the lands as "white" and "Indian" and included the Hood land under his name as "white" and further repeatedly solicited the Hoods to execute a lien contract which they did not do. It is true that this particular item might be ascribed simply to a desire to avoid litigation but that cannot explain the further portion of the finding that contracts were asked of Indian owners of 61 tracts within the diking project held under such fee patents and obtained from 48 of them. If the liens, ipso facto, were good, why such expenditure of time and effort to obtain contractual sanction for them?

One may hazard the guess that in the preparation of the Act by the Department of the Interior, whether by mental inertia because the allotments in so many of the reservation lands they deal with are "trust allotments", that the basic fee quality of the titles involved in the Lummi Reservation was overlooked, and that the effort to obtain private contracts was made

* See Appendix viii. - ix.

to bridge the gap. It would seem that the counterclaim likewise reflects the same fatal error. It refers to the "underlying fee" being held in trust by the United States (Tr. 47); which under the authorities is not fact.

We submit that the dilemma cannot be resolved; that no lien exists because there is no contract and no constitutional right, even against the heirs to impose it, and that this issue alone may determine the case and compel reversal.

THE EFFECTIVE DATES OF THE MEMORANDUM OF SALE AND THE INDIAN DEED TO THE HOODS WERE THE RECITED DATE OF NOVEMBER 10, 1925.

A.— THE MEMORANDUM UPON ITS SIGNING CONSTITUTED A PRESENTLY EXISTING EXECUTORY CONTRACT.

At the outset, we take it that it is not to be denied that the two documents, the memorandum of sale and the deed, are to be construed together. They relate to the same objective, and involved the three parties concerned in the ultimate transaction, namely, the Indian heirs, the United States acting by and through its Indian Bureau personnel, and the Hoods. They were prepared at the same time, by the same persons and bear the same date; they are connected by internal evidence; that is, the reference in the memorandum to the execution of the deed and the arrangements for its escrow and delivery.

For text of memorandum see app ii.

But when we examine into the two documents we find that in truth they are compounded with the law and the regulations of the Interior Department to spell out the actual agreement and to reveal the legal relations of the parties.

The "memorandum" itself is suggestive of an ordinary contract for the sale of real estate. It clearly refers to the "sale" of a described property—a designated Lummi "allotment", and recites the purchase price and its form: cash and notes— and the terms of subsequent payment. It names the purchasers, and is signed by them. In return for the payment it assures the purchaser of a "conveyance" and fulfillment deed which is to be escrowed, and delivery thereof is promised when final payment is made. It provides, as against the purchasers, and if they default, the alternative sanctions of forfeiture of the cash already paid on the one hand and (while not in express terms, yet clearly by implication) authorizes collection of the notes on the other.

But in other respects it differs from such a contract. While the latter uses such typical language as "the seller *contracts to sell* and the purchaser *contracts to buy*" and that the purchaser "*shall pay*" the price and the seller "*shall execute* and deliver *a proper deed*" this "memorandum" uses the past tense and the active voice; it recites that the purchasers (the Hoods) "*having purchased*" the allotment, thus indicating an accomplished transaction, and "*having made payment*"

in cash and notes, rather than directly obligating the *vendor* to give deed, it provides that "a deed duly executed by the heirs . . . *shall be delivered* to (the Hoods) conveying the land to them and their heirs pursuant to law." It also differs (1) in that the names of the vendors are not mentioned directly; (2) nor is it signed by them; (3) nor does it give them the right to exercise the alternative sanctions in the event of default in payment of collecting on the notes or terminating the contract and forfeiting the previous payments; but rather it is signed by W. F. Dickens, "Superintendent and Disbursing Agent", and the right to exercise such sanctions is given to the Secretary of the Interior "for the use of the heirs."

Since the escrow provisions tie in the deed, the recital of the names of the grantors therein does supply the names of the vendors. Through it also is imported into the agreement the covenants therein specifically obligating the heirs individually

> "*forever* to *warrant* and *defend* the said premises *against the claims of all persons, claiming* or to claim *by, through* or under *them* only."

Except for the provisions that the notes shall be payable to "the superintendent" there is nothing in either instrument to indicate his status, or to what effect he signed the memorandum. As to the Secretary of the Interior, it is provided that if the Hoods should pay the notes, the deed which as above stated "shall be delivered" to them shall "be approved" by the Secretary and, as indicated above, the vendors' remedies

upon default, are to be exercised by that officer, "as provided by law". And the United States is also involved in the provisions making the Commissioner of Indian Affairs the escrowee of the deed.

These references to "the law" and the officers of the United States make it plain that the provisions of law are to be imported into the agreement.

Finding VII (Tr. 68-69), which was not objected by appellee, establishes that the Hoods transactions conformed to the "~~legislation and regulations of the Bureau of Indian Affairs providing for the release of such restrictions (upon alienation~~" and

> "legislation and regulation of the Bureau of Indian Affairs providing for the release of such restrictions (upon alienation) and at the request of the heirs and *after formal invitation to bid had brought no offers, . . . Percy Hood made an offer, which was incorporated into . . . the memorandum of sale.*"

So the picture emerges. The Indians had fee title. They wanted to sell. They could not do so without the approval of the Secretary. Obviously as the condition of his approval, the law and regulations put the negotiations for sale into the hands of the Secretary and his subordinates in the Indian Bureau. As will be brought out later the courts have consistently held the only purpose of executive approval for such sales was to protect the Indian owners from improvident or unwise sales The regulations do in fact provide for appraisals. Obviously also, the procedures required "requests" from the heirs, and formal invitations to

bid, both of which were done and given, until the Commissioner himself "suggested" (in effect solicited) a bid from Mr. Hood. Incidentally the correspondence file in the Indian office supplied the evidence for that finding.

All this meant that, in effect, the United States by and through its proper officers were constituted agents by the heirs to effect a sale of land. That the relationship might also be that of a guardian is immaterial. Agency in the broad sense consists of acting for or in behalf of another. The sale was of Indian owned property for "the use of" the owners. Everything involved necessary to effectuate for or in behalf of the vendors was done by Indian Bureau officers. By the Findings all that was done was authorized, if not demanded, by law.

The following legal results thus necessarily proceed from these transactions; as of November 10, 1925 upon execution of the memorandum:

1. The Indian heirs were obligated as principals to perform what they had requested their agent, the United States to promise; namely, to execute and deliver in escrow the deed then prepared and coincidentally dated and thus to warrant the title to the Hoods against any claim arising by or through them.

2. The United States:

(a) both under its agency duty to the heirs and its contractual duty to the Hoods, was ob-

ligated to procure (at least use its best efforts to procure) the formal execution of the deed and the to hold it in escrow pending payment, and by its said Secretary formally to approve both it and the memorandum if in accordance with law it should do so. (In this connection while the memorandum did not in terms provide for separate approval of it, the Findings show it was approved and we are compelled in infer —and indeed the regulations so provided—that such approval was required).

(b) under its agency duty to the heirs to collect or at least receive payment for the notes, or if default occurred to exercise the sanctions thereunder applicable.

(c) under its contractual duty to the Hoods, to deliver the deed when and if payment of the notes was made.

(d) for both parties, as a matter of law inherent in every contract, to exercise good faith to each of the other parties.

Can there by any doubt that these relations arose immediately upon the signing of the memorandum and the delivery of the $2525.00 and notes for $7575.00? It will be suggested, no doubt, that there was nothing binding upon the parties until and unless the deed and memorandum were "approved"; also, that since the record shows there were minor heirs until they were bound by proper state court guardianship proceedings there could be no contract binding upon the others.

But that proposition is not sound. Since both approval and the minors guardianship proceedings were finally accomplished, and since all of the proceedings were found to accord with the law and regulations, we must assume that the United States had provided (as indeed it did) for the exigencies of minor rights. In the very nature of things, such rights were inevitably to be encountered in the conveyance of heirship titles. In short any practical scheme for such sales must take them into account. We must assume that there was a proper machinery for the commitment as to them and that it was followed, and that the subsequest formal guardianship proceedings were either required consequences therof or done, as something additional to the regulations to satisfy the purchasers as to their title.

Since the department regulations are subject to judicial notice we may point out, that those applicable to such sales were brought to the attention of the court below and are to be found in Chapt. I, Title 25, Code of Federal Regulations, pages 321-323. From these we quote:

> Sec. 214.18. PETITION TO SELL INHERITED LANDS. (a) if the petition is made by the heirs of a decedent, it shall set forth every material fact necessary to show full title in the petitioners, on Form 5-110, and shall be signed by all the adult heirs on their own behalf, by the guardian of a minor heir who has such guardian and by the

> Superintendent or other officer in charge of the agency or school on behalf of any orphan heirs".

Since it cannot be assumed that these regulations and laws are mere idle words and empty gestures we must conclude that the agency contract and relationship above described bound, and under the plenary power of the United States incidental to its duty of passing upon approval did bind, all of the heirs, including the minors, to such sale as might ensue under the proceedings initiated by their petition. No heir then had the right, either as against the common agent, the United States, or against the rights of the other heirs, to withdraw, and after the memorandum had been signed had no such right as against the Hoods, and correlatively each had the right to rely on the further participation of each of the others.

Could the Hoods have withdrawn? Obviously not, except by a breach subjecting them either to suit on their notes or forfeiture. Assuming the United States had given sovereign consent to such an action, on what basis of the common law of contracts could the Hoods successfully have sued to recover their deposit if they simply wished to get out from under the deal? So long as the United States and the Indian heirs went forward in good faith to perform their parts of the obligation there could be no breach, and the existence of such a breach, it is elemental law, would be the sole foundation for such withdrawal.

What has just been said also disposes of any con-

tention that may be made, and which seems to be the foundation of the appellee's position that until the "approval" of the Secretary there was no binding contract. Such a contention can only rest on the theory that "approval" was a condition precedent. At this point we need not consider whether it was a condition precedent to the deed (we show infra that it was not). We need here only consider whether it was a condition precedent to the arising of contractual rights under the memorandum.

It is vital that we here distinguish between a condition which is precedent to the coming into existence of a contract from conditions which after the contract has arisen qualify or make dependent certain or all the rights thereunder. This distinction is remarked in Williston on Contracts, Rev. Ed., Sec. 666, where it is said:

> "In the law of contracts conditions may relate to the *existence of contracts* or to the duty of immediate performance under them".

That the latter (payment prerequisite to the deed) exists here we do not doubt but that is beside the point. By the inherent force of circumstances the "approval" of the deed had to be subsequent to the agreement for the sale. Approval cannot be given to what does not exist. Preliminary rights, "conditioned" on the subsequent granting of approval could, of course, be given and as a practical matter would be the only way by which the sale requested by the heirs could be eventuated. So what was done by the "mem-

orandum" was simply to make a sale subject to being avoided in the event that approval were not given. Even then, there was the implied further condition of good faith, that the United States would approve, both as a duty to the vendor heirs and the purchasers, if the sale met with its standards. The provision for approval was, as to the sale, in effect a provision for a condition subsequent. Until and unless that condition occurred, namely, the refusal of approval, all the parties possessed existing rights; in short the ordinary rights involved in an executory contract of sale of realty; the right of the Indian vendors to receive the money and notes unless the Secretary disapproved; the right of the purchasers to receive an appropriate deed unless the Secretary disapproved; and each owed the duties reciprocal to such rights.

B.—THE EFFECTIVE DATE OF THE INSTRUMENT WAS NOVEMBER 10, 1925 UNDER THE DOCTRINE OF EQUITABLE CONVERSION.

We submit that the rule in elementary. In 19 Am. Jur. 11 (Equitable Conversion, Sec. 11) it is stated:

> "Thus, an executory contrart for the sale of lands works a conversion, since equity regards 'Things agreed to be done as actually performed' and treats the vendor as holding the land in trust for the purchaser, and the purchaser as trustee of the purchase price for the vendor. *The vendee* is, *in the contemplation of equity, actually seised*

of the estate. Hence, he is held liable for any loss that may occur to such estate between the agreement and the conveyance and will enjoy any benefit which may accrue in the same interval. . . . It is a well established principle that, pending the completion of an enforceable executory contract for the sale of real estate, such real estate is considered converted into personalty from the time of the execution of the contract, notwithstanding the fact that an election to complete the purchase rests entirely with the purchaser".

Under the title of Vendor and Purchaser, Sec. 356, 55 Am. Jr. 783, the rule is stated:

"In equity a contract for the sale of land is treated for most purposes precisely as if it had been specifically performed." and at page 784:

"A sale by the government, when made in pursuance of law, confers on the purchaser the equitable title to the premises, to the same extent as a sale by an individual holding the fee".

The case of Brill v. Stiles, 35 III. 305, 85 Am. Dec. 364, cited to the last proposition fully sustains the statement.

If, as shown above, the fact that the transaction was conditional upon the purchaser not exercising an absolute right to elect not to complete would not bar the doctrine, certainly the fact that completion was contingent on a third person's disapproval, as here, would not do so, absent such disapproval.

C.—THE EFFECTIVE DATE OF THE INSTRUMENTS WAS NOVEMBER 10, 1925 UNDER THE DOCTRINE OF RELATION BACK.

16 Am. Jur. 620 (Deeds, Sec. 321) states:

> "With reference to the time of delivery, the general rule is that all the several parts and ceremonies necessary to complete a conveyance are to be taken as constituting one act and to operate, as between the parties and their privies, by relation from the time when the substantial part was performed . . . ."

and on page 621 (Sec. 323):

> "As between the parties and *for the advancement of justice, a deed may be deemed to relate back to the date* that the grantor agreed to sell and the grantee agreed to purchase the premises" . . .

To the same effect 26 C. J. S. 346 (Sec. 94) it is said "It is generally the rule that a deed takes effect from the date of its delivery not from the time of its execution. Under certain circumstances, however, the court applies the doctrine of relation back by which passage of title is considered by operation of law to relate back to a prior date, provided no prejudice results to intervening equities. Accordingly a deed speaks from its date when such is the intention of the parties as where they deliberately antedate the deed."

and on page 347:

> "While it is generally held that a deed executed pursuant to a contract for sale takes effect on delivery, it will be considered for some purposes to relate back to the date of the contract".

These principles have been repeatedly applied to the very kind of deed here involved. In Pickering v. Lomax, 145 U.S. 310, 36 L. Ed. 716, and in Lomax v. Pickering, 173 U.S. 26, 43 L. Ed. 601, 19 S. Ct. 416,

Indian lands near Chicago were about a hundred years ago patented to an Indian, Robinson, the patent restricting the right to convey "without the permission of the President." He conveyed to plaintiff's predecessor by deed dated in 1885 and first recorded without any approval by the President. This grantee died, and his Administrator conveyed, as did the grantee of the Administrator, whose grantee, on January 21, 1871 procured approval of the deed from the then President, 13 years after its date. Meanwhile, Robinson conveyed the same property again by deed to defendant made in November, 1870, and approved by the then President on February 24, 1871. Judgment below and in the Supreme Court of Illinois was for defendant on the grounds that the original deed was void for lack of Presidential approval, and that even if such approval gave force to the deed, since the grantee therein was deceased such deed would inure to his heirs, not to those claiming through his administrator.

The Supreme Court held that while the title was imperfect during the interim before approval

> "the delay was immaterial provided that no third parties have in the meantime legally acquired an interest in the land".

That the grantee died before approval was immaterial as the "ratification" inured to his grantee, not in the sense that an after acquired title woud do so, but "as a deed imperfect when executed may be made perfect as of the date when delivered." The court also said:

> "The object of the proviso was not to prevent alienation but to protect the Indian against improvident disposition of his property."

On the retrial which followed remand the main issue was whether the second grantee took in good faith, that is, whether the recording of the first deed without endorsement was notice. Holding that it was notice, the court reaffirmed its position, describing the prior opinion as holding that the approval was "*retroactive and equivalent to permission before execution and delivery.*"

In Lykins v. McGrath, 184 U.S. 169, 46 L. Ed. 485, 19 S. Ct. 450, there was an Indian patent, pursuant to treaty, which contained a restriction upon alienation "without the consent of the Secretary of the Interior." The patentee conveyed by deed dated June 3, 1864 which was approved by the Secretary on March 10, 1865 but in the interim the patentee died. His heirs sued for possession against the grantees of their father's grantee. During the time material to the issues there was in effect an Act of Congress providing that permission for sale of such patented lands would be given under such conditions as the Secretary might prescribe. In this respect that case is identical, in effect, with the one at bar. The court held that the Pickering case had settled the proposition. Noting the contention that the doctrine should be denied there because "interests of new parties (the heirs) had sprung into being intermediate the execution and approval",

the Court said:

> "But one of the purposes of the doctrine is to cut off such interests and to prevent a just and equitable title from claims which have no foundation in equity. The doctrine of relation may be only a legal fiction but it is resorted to with the view of accomplishing justice. What was the purpose of imposing a restriction upon the Indian's power of conveyance? Title passed to him by patent, and but for the restriction he would have had the full power of alienation . . The restriction was placed upon his alienation in order that he should not be wronged in any sale he might desire to make; that the consideration should be ample; that he should in fact receive it; and that the conveyance be subject to no unreasonable condition or qualification. It was not to prevent sale but to guard against an imposition therein. When the Secretary approved the conveyance it was a determination that the purpose for which the restriction was imposed had been fully satisfied All this being accomplished, *justice requires that the conveyance should be upheld, and to that end the doctrice of relation attaches the approval to the conveyance and makes it operative as of the date of the later*. . . It is . . . like a deed . . placed in escrow . . . While ordinarily in case of an escrow title passes on the date of the second delivery, yet often, for the prevention of injustice the deed will relate back to the first delivery so as to pass title at that time".

The court pointed out that the plaintiff heirs had no superior equities; they were entitled to what the father had at the time of his death and were not bona fide purchasers for value.

More recently, on almost parallel facts where an allottee had given on oil lease on December 5, 1914 and died on October 11, 1915 and the lease was approved by the Secretary on October 21, 1915 and where the law provided that heirs of the allotee could convey with the approval of the county court, and the heirs did re-lease with such approval, in the resulting contest between the two lessees in Anchor Oil v. Gray, 257 Fed. 277, Judge Sanborn held for decedent's lessees because the heirs stepped into her shoes, and the first lease estopped them unless the Secretary should have refused to approve the first lease, and when he did approve the estoppel became absolute, against those claiming under either her or the heirs, and the approval related back and took effect as of the date of the execution of the decedent's lease.

To apply this holding to the present case, it is clear that the United States as a "new party" is in no better position than the heirs in those cases. It parted with nothing. It had knowledge of, and indeed had initiated the Hood transaction; in seeking to promote the dike it had no more difficult position against the Hoods than against the many other holders of lands held under conveyances it had approved.

The doctrine was likewise applied to Indian conveyances in: Snell v. Canard, 95 Okla. 145, 218 Pac. 813; Tiger v. Jewell, 90 Oka. 34, 215 Pac. 1062; Scioto Oil Co. v. O'Hern, 67 Okla. 106, 169 Pac. 483; McElroy v. Peggett, 167 F. (2d) 668; Hampton v. E-

wert, 22 F. (2d) 81; U.S. v. Getzelman, 89 F. (2d) 531 (cert. denied); Harris v. Bell, 254 U.S. 103, 65 L. Ed. 159, 41 S. Ct. 49, Hallam v. Commerce Mining and Royalty Co. 49 F. (2d) 103.

Appellee may urge that since the guardian's deed for the minor heirs was not approved by the state Probate Court until June, 1926 the deed to the Hoods could not have been approved until after the Act. But we answer that this begs the entire question of the operation of the doctrine of relation back. So far as the regulations are concerned the minors appear to have been bound by the memorandum. The guardian's deed was an extra safeguard and formality. But beyond that, it should be noted. Finding IX, Tr. 71, app. vii.) that the date of the guardian's sale was March 8, 1926, prior to the act. That confirmation by the probate court was not accomplished until June is immaterial to its validity, for

> "by weight of authority, the confirmation of a judicial sale and the deed executed in pursuance thereof take effect by relation back to the date of the sale". 31 Am. Jr. 487.

(Literally, the findings said the sale was "after March 8" but also that no special bid was made, so that the sale actually was made as part of the total bid, and must be deemed to have been made at the earliest date).

Thus, all of the formalities of all heirs, adult and minors, necessary for the passing of title had been accomplished by the date of the Act, so that by then

the United States, and the heirs, had performed thier respective obligations under the executory agreement, save only for the formal approval by the Secretary. The stage then was comparable to the situation of the grantee of the first deed in Pickering v. Lomax, supra, immediately after he received the deed, and the words of the court thereon are particularly apt when it said:

> "Had the grantee, the day after the deed was delivered sent it to Washington and obtained the approval of the President, it would be sticking in the bark to say that the deed was not thereby validated. A delay is immaterial . . "

So, here the entire delay was "immaterial"; certainly not that which was occasioned by formalities which the United States was bound to foresee, and which by the operation of law itself became nullified under the doctrine last above quoted from Am. Jur.

That reasoning applies particularly to the deed. But the "memorandum of sale" was also to be approved. Since it was held up and sent with the deed, we must assume that this was pursuant to the department's own regulations. Otherwise that document could have been approved immediately after its execution. Without the doctrine of relation back, we would be forced to conclude that the Secretary intended his own regulations to be a trap for the unwary or the unfortunate, and by which he could provide an interval in which new burdens could be added to those of the buyers. Such would indeed be "sticking in the bark;" would it not, in effect, be also just plain fraud?

D.—THE UNITED STATES IS ESTOPPED FROM DENYING THAT THE INSTRUMENTS WERE EFFECTIVE AS AGAINST IT FROM THEIR DATES OF EXECUTION.

The authorities immediately supra support our contention that there is here an estoppel by deed against the United States. Such an estoppel is "a bar which precludes one party to a deed *and his privies* from asserting against the other any right or title in derogation of the deed", 19 Am. Jur. 603. By said authorities the deed to the Hoods relates back to November 10, 1925 as between them and the Indian vendors *and their privies*. Is the United States privy to the vendors? If so, the Hoods must be deemed to have acquired title prior to the Diking Act and would be entitled to the same relief given to the other six plaintiffs in this case.

"Privies who are bound by such estoppel include privies in blood *and estate*", 19 Am. Jur. 604. Privies would certainly include grantees or voluntary lienees such as a mortgagee. All the more so, then, lienees under a compulsory or unilateral lien such as is here sought. Surely the rights of the United States cannot rise higher than their source, namely, the Indian vendors, for it is only on the theory that because of the title of these vendors the land was "in Indian ownership" that it is subject to the lien. Also the United States is a privy by the express language of the warranties in the deed against claims arising by or under the Indian vendors.

In the Pickering, Lykins and Anchor Oil cases, supra, the relations back doctrine sustained estoppel against privies under identical circumstances as here, namely, subsequent grantees of the estopped Indian vendor in the first and heirs in the other two.

But we submit that over and beyond the estoppel by deed, which is strictly technical, the present is an appealing instance of estoppel in pais or equitable estoppel. This doctrine is "founded upon principles of morality and fair dealing and is intended to subserve the ends of justice." 19 Am. Jur. 640-641 (Estoppel, Sec. 42). It is essentially one of good conscience; it is based upon the application of the Golden Rule to the everyday affairs of men. (see note 18 to Sec. 42, supra). It involves three essentials of the various statements of which the following is particularly apropos: (1) an admission, statement or act, inconsistent with the claim afterwards asserted and sued on; (2) action by the other party on the faith thereof; (3) injury to such other party from permitting the first party on contradict such act, State ex rel Shartely v. Missouri Utilities Co. 331 Mo. 337, 53 S.W. (2d) 394, 89 A.L.R. 607 (see note 4 to said section 42). "It holds a person to a representation made or a position assumed where otherwise inequitable consequences would result to another, who, having the right to do so, under all the circumstances of the case, has in good faith relied thereon and been misled to his injury." Sec. 42, supra.

Here the United States, both by its legislation auth-

orizing such sale and by the specific acts of its agents, induced the Hoods to part with their money and notes on the promise contained in the memorandum that upon payment of the latter, a "deed duly executed and approved . .*conveying said land to them . . pursuant* to law" would be delivered to them. What kind of a deed, what kind of conveyance? Clearly that kind which would "convey the land"—not a partial interest in the land; not a title that was half a title; not a title that contained in it the seeds of its own possible destruction. Good faith, conscience, morality, all these meant that the United States pledged that and no other.

The very history of the transaction is proof that the Hoods relied on this position of the United States. What else would prompt them to part with $10,100-.00?

Are they injured? Yes, if the United States thirty years afterwards is allowed to change its position and say that its left hand did not know, and is not bound by, what its right hand is doing. Yes, if without their consent they are required to pay substantial sums for that which they do not believe is of benefit, and which they, their "heirs and assigns" will continue in perpetuity to be required to pay for operation and maintenance.

In short, they made a present deal in November with the measure of their obligation and benefits fixed. Midway of the game, in March following, the other side changed the rules.

No court would permit such conduct to a private party. Is it open to the sovereign? Clearly not on the ground of social morality. Nor on legal grounds. It is true, we concede, that the government may not be estopped by acts of its agents. But here the government in imposing the diking lien is not acting in an administrative or ministerial capacity but as a corporate body through the Congress. It is, moreover, acting in connection with private rights. While its actions with reference to care of the Indians is a social duty grounded in morality, when it deals with their properties it is dealing as any other guardian or custodian; the more so when such dealing involve the private rights of other parties. So it is held , 54 Am. Jur. 632:

> "So far as the United States acts in a proprietary capacity or enters into contract relationships, an estoppel may be asserted against it provided the functions of government are not impaired thereby."

No function was here impaired. The Act recognized that the dike might benefit private lands. It dealt with the problem of asserting the costs against such lands. That there were substantial amounts of such land is shown by the complaint of the six other plaintiffs. To embrace one more tract to those in the category of privately owned lands would hardly impair a function of government.

There is authority that holds that estoppel may be applied against the United States. See Annotation in

23 A. L. R. 1420 (ann. 1423 et seq) Banson v. Wirth, 17 Wall. (US) 32, 21 L. Ed. 566 and Fletcher v. Peck, 6 Cranch (US) 87, 3 L. Ed. 162. In the latter where a deed was issued to public land pursuant to a proper statute, the legislature subsequently could not repeal the statute and annul the grant because of fraud in the procurement in the passage of the statute as against an innocent purchaser. In the former it was said that if the United States should issue a patent for one quarter-section of land, the patent would estop it from reclaiming the land and asserting it intended to grant an adjacent tract.

AT THE LEAST THE APPELLANTS HAD A VESTED PROPERTY RIGHT PRIOR TO THE ACT WHICH THE LIEN UNDER THE ACT WOULD IMPAIR CONTRARY TO DUE PROCESS.

Whatever may be said as to the contentions raised above, it is clear that upon the execution of the memorandum the Hoods had vested rights and that these constituted property. They had the right from that time on to have the Indian agent procure the execution of the deed and to have it submitted to the Secretary and if approved to receive the deed with the warranted title it would convey, and to have that title unimpaired by any arbitrary act of the United States.

At the very least this right is comparable to those

acquired upon the acceptance of a bid or offer in a judicial sale.

> "He (the purchaser) acquires, by acceptance of his bid, a vested right, sometimes called an equitable or inchoate title, which is recognized and enforced by law, and must be respected by the court and may not be disregarded or taken away from him except for sufficient legal or equitable reasons". 31 Am. Jur. 477.

All of the arguments we have previously urged as to the inviolabilty of the Indian fee title to the arbitrary lien proposed by the Act apply fully as much to these vested rights of the Hoods. It is elementary that this constitutional safeguard applies to all qualities of private rights in property. If the Act be deemed to apply to the Hoods, then it must be held unconstitutional.

IN ANY EVENT THERE IS NO LIEN UNDER THE ACT FOR OPERATION AND MAINTENANCE.

In addition to the $399.40 claimed by the United States under its asserted lien for the construction charges of the dike, the judgment included recovery of $1207.77 or operation and maintenance up to and including July 6, 1955. (Finding XI. Tr. 73 app. ix, Tr. 82 and see Judgment, Tr. 83).

We submit that the record is completely devoid of any foundation whatsoever for the imposition of any charge for operation or maintenance. Whatever may

be the social justification in the eyes of the Indian administrators for the dike and/or its operation and maintenance they may not impose a charge therefor without a warrant of law. It should be conceded that any legislation to impose a burden on property will be be strictly construed. But there seems to be not even any language to construe. On this subject, the court will find the statute a blank. Independently of all other contention raised on this appeal, the allowance of this item should be reversed.

CONCLUSION

The presentation of appellants' case has been fraught with features that have been unhappy to them and their counsel. They have sharp things to say. That these are deemed necessary we regret. Nevertheless our belief in our position leaves no other avenue; particularly if one holds as is the conviction of both appellants and their counsel, that where government offends it is the duty of citizenship to protest, the more so when means of so doing are possessed. Obviously, the mere dollars and cents involved would have by themselves made the appeal of doubtful material advisability.

This requires a further statement. Offhand, appellants and the other plaintiffs might appear to be motivated by the hope of getting a "free ride." But, in truth, they all denied, either wholly or largely, the factual existence of benefits, remembering that for decades their lands had been productive *without the dike.* Rather, in their view, the project would compel them

to contribute improvements to others, without corresponding benefits. Further, we submit that even a cursory look at the lien contract requested of them will raise justification for their position. By signing, their lands would be bound forever to such additional costs, both of construction and maintenance, which executive order, without the necessity of consultation or participation by them in any decision, might see fit or find the means of incurring it. (See Ex C. tr. 21)

Without intending the slightest retraction of these views, we can recognize the administrative dilemmas imposed upon the Indian Bureau; first, of course, in deciding whether to act without the unanimity of contracts required by the act; secondly, in seeking maintenance, where no maintenance was Congressionally provided for. But we have not found that such sympathy either justifies what to us are offenses, or allays the duty to resist submission.

Rather, we think, these factors, more sharply focus in human terms the merits of our contentions, both constitutional and those grounded in contract and equity.

Respectfully submitted,

DONALD M. BUSHNELL,

ATTORNEY FOR APPELLANTS.

APPENDIX

ACT OF MARCH 8, 1926, 44 STAT. 211-12

"An Act for the purpose of reclaiming certain lands in Indian and private ownership within and immediately adjacent to the Lummi Indian Reservation, in the State of Washington, and for other purposes."

Sec. 1. That there is hereby authorized to be appropriated the sum of $65,000 or so much thereof as may be required, for reclaiming by construction of dikes approximately four thousand acres of land in Indian and private ownership within and immediately adjacent to the Lummi Indian Reservation, in the State of Washington: Provided, that the total cost of the project shall be distributed equitably among the lands in Indian ownership and the lands in private ownership that may be benefited in accordance with the benefits received as designated by the Secretary of the Interior.

Sec. 2. The construction charge properly assessable against the Indian lands shall be reimbursed to the Treasury of the United States under such rules and regulations as the Secretary of the Interior may prescribe, and there is hereby created a lien against all such lands, which lien shall be recited in any patent issued therefor, prior to the reimbursement of the total amount chargable against such lands.

Sec. 3. No part of the sum provided for herein shall be expended for construction on account of any lands in private ownership until an appropriate repayment contract in accordance with the terms of this

Act and in form approved by the Secretary of the Interior shall have been properly executed by the landowners whose lands may be benefited by the project.

Sec. 4. The Secretary of the Interior is hereby authorized and directed to declare by public notice the cost of the project and the equitable share to be assessed against the lands, benefited in accordance with their respective benefits, which cost shall be repaid in annual installments, the first installment to be 5 per centum of the total charge and be due and payable on the 1st day of December of the third year following the date of such public notice, the remainder of said costs with interest on deferred amounts against land in private ownership from the date of said public notice to be 4 per centum per annum to be payable on each December 1 thereafter, on the same basis as the first installment, until the obligation is paid in full.

Sec. 5 The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

MEMORANDUM OF SALE OF ALLOTTED LAND (WHEN CONVEYANCE IS DONE BY DEED).

The undersigned Percy Hood and Grace H. Hood, his wife, having on November 10, 1925, purchased

Lots 5, 6 and 7 of Sec. 6, Twp 38 N., Range 2 E., W. M., containing 79.82 acres more or less allotment No. Lummi 22 of Lummi Indian Reservation, Washington, for $10,100.00, and having made a payment of $2,525.00 being 25 per cent thereof, and agreed to pay the balance thereof, being $7,575.00 in deferred payments as evidenced by four promissory notes of even date herewith for $1,893.75 each, numbered from one to four payable to the Superintendent or other officer in charge of the Tulalip Indian Reservation, on or before 1, 2, 3, and 4 years after date, with interest at the rate of six per cent per annum, payable annually from the date of approval of this memorandum by the Secretary of the Interior;

Now This Memorandum Witnesseth: That upon the payment in full by said Percy Hood and Grace H. Hood, his wife, of said sum of $7,575.00 being the balance of said consideration of $10,100.00, with interest thereon, according to the tenor and effect of said notes, then and in such case a deed duly executed by said heirs of Mary Yahimaloo, and approved by the Secretary of the Interior, shall be delivered to said Percy Hood and Grace H. Hood, his wife, conveying said land to them and their heirs pursuant to law.

And said Percy Hood and Grace H. Hood, his wife, agree that upon default by them in the payment of said notes or either of them or the interest thereon, the sale of said land to Percy Hood and Grace H. Hood, his wife, may, at the option of the Secretary of the In-

terior, be cancelled and said land readvertised for sale, and in such case the sum of $2,525.00, being 25 per cent of the amount agreed to be paid by said Percy Hood and Grace H. Hood, his wife, shall be forfeited as provided by law for the use of the heirs of Mary Yahimaloo, vendors, and any balance remaining of the amount paid by said Percy Hood and Grace H. Hood, his wife, after deducting said 25 per cent forfeiture, shall, in case the same is not repaid to Percy Hood and Grace H. Hood, his wife, by the vendors, be repaid them out of the proceeds of such subsequent sale, or from such other sources as may be applicable in the discretion of the Secretary of the Interior;

It is further understood and agreed that the deed hereinbefore provided for shall be retained in escrow by the Commissioner of Indian Affairs until all the notes and interest before mentioned shall have been paid, when it shall be delivered to said Percy Hood and Grace H. Hood, his wife, as hereinbefore provided.

Signed at Ferndale, Washington, this 10th day of November, 1925.

(s) W. F. DICKENS,
Superintendent and
Disbursing Agent;
(s) PERCY HOOD;
(s) GRACE H. HOOD,
Purchaser.

Stamp: Department of the Interior, Washington,

D. C., Aug. 10, 1926.

Approved:

(6856)

(s) JOHN H. EDWARDS,
Assistant Secretary.

PERTINENT FINDINGS OF FACT

VII.

That the lands of the plaintiffs, Percy Hood and Grace Hood, involved in this cause are described as

> Lots 5, 6 and 7, Section 6, Township 38 North of Range 2 E. W. M., containing 79.82 acres more or less.

That pursuant to treaty between the United States and the Lummi Indians the said tracts were first allotted and later patented to "Mary Yahimaloo or Mary" by the United States by its patent issued and dated December 31, 1885, copy of which as Exhibit D was made part of the complaint in this cause and by reference made part of this Finding; that by its pertinent provisions the United States did "give and grant" said tracts to said grantee, subject to a stipulation that "the same should not be aliened, "and to have and to hold the same unto "her and her heirs forever, with the stipulation aforesaid"; that the same and similar patents were known and referred to by the Indian Bureau as "restricted fee patent"; that thereafter (Congress provided that)*1 pursuant to and on conformity with legislation and regulation of the Bureau of Indian Affairs providing for the release of such

*1 Words in bracket inserted in original finding by error.

restrictions and the alienation of such lands and (of)* the request of the heirs of Mary Yahimaloo (to whom title to said property had descended upon her death), and after formal invitations to bids, had brought no offers, the plaintiff, Percy Hood, at the suggestion of the Commissioner of Indian Affairs, made an offer, which was incorporated into an Indian Bureau form entitled "Memorandum of Sale," on and under date of November 10, 1925, copy of which, as Exhibit E thereto was made part of the complaint, and which by (Congress provided that) pursuant to and on consigned in behalf of said Department by "W. F. Dickens, Superintendent and Disbursing Agent" of the Agency having charge thereof, and by the plaintiffs Percy Hood and Grace Hood (here follows digest of contents for the full text of which see this appendix, page —) that the said down payments and notes, so dated, were given by the Hoods to said Agent in charge on the same date, to wit November 10, 1925.

VIII.

That at the same time, and bearing the same date of November 10, 1925, there was prepared at the office of said Agent the "Indian Deed of Inherited Land," a copy of which as Exhibit F was attached to and made a part of the complaint, which recited as grantors the names of some twenty-three heirs of Mary Yahimaloo and the said W. F. Dickens, referred to as "Legal Guardian of" four named minor heirs, two having 2-864th and two having 8-864th undivid-

* "of" is in error for "at"

ed interests therein, and provided that in consideration of $10,100.00, the grantors "do hereby grant, bargain, sell and convey unto" Percy Hood, his heirs and assigns forever, the said real property, and that the grantors "covenant, promise and agree" with said Hood, his heirs and assigns, to "warrant and defend said premises against the claims of all persons, claiming or to claim by, through, or under them only"; that the said deed bears the signatures of all said adult heirs, and their respective acknowledgments taken at various dates from Novmber 16, 1925 to January 16, 1926; that said signatures and acknowledgments were obtained by or through said Indian Agency.

IX.

That after the making of said "Memorandum of Sale" Walter F. Dickens, the Superintendent of the Agency, procured the appointment of himself to be the guardian of the four minor heirs, in separate causes, in the Superior Court of Whatcom County, Washington, and thereafter proceedings were had thereunder in which he was authorized and did sell the interests of said minors to Percy Hood; that the consideration recited in said probate proceedings was the proportion of the total consideration of $10,100.00 required of the Hoods which was in ratio to their respective undivided interests; that in fact the Hoods paid no other or separate consideration than the original offer of $10,100.00 except for interest on their deferred notes, and made no separate nor distinct bid in

the guardianship proceedings; that the return of sale in said proceedings referred to the sale as being made after March 8, 1926, but did not specify any date but the orders of confirmation were entered on June 4, 1926; that thereafter the "Memorandum of Sale", which had been withheld from the Hoods up to that time and the said deed, the latter being plaintiff's Exhibit II were sent to the Office of the Commissioner of Indian Affairs in Washington and both were thereafter approved on or about August 10, 1926, by the Secretary of Interior by his Assistant; that thereupon one of the copies of the "Memorandum of Sale" was handed to Mr. Hood, but said deed was held in escrow by said Superintendent; that on about the month of April, 1928, and before the maturity of all of said notes the Hoods paid the balances due on said notes and said deed was delivered to them; that although the deed above mentioned was signed by said Walter F. Dickens as guardian and acknowledged by him on or about June 4, 1926, two deeds were given by him, respectively covering the said undivided interests of the said minors which were also duly approved on or subsequent to August 10, 1926, by the Secretary of the Interior;

X.

That in the "Schedule of Charges" incorporated by reference into the Public Notice heretofore mentioned the Secretary of Interior classified the lands within

the Project as W (for lands owned by white persons) and I (for lands owned by Indians); that in such Schedule he classified the said lands of Percy and Grace Hood as white owned; that at various times through his agents the Secretary solicited the said Hoods to sign repayment contracts; that they have never signed any such contract with reference to said lands; that as to lands in Indian ownership held under restricted fee patents repayment contracts were solicited of the the owners and signed with respect to 48 out of 61 such tracts;

XI.

That the total construction charges assessed by the Secretary of the Interior against the Hood land are $399.40; that the total operation and maintenance charges assessed thereto computed to July 6, 1955 are $1,270.77; that the United States claimed penalty charges on said operation and maintenance charges as of July 6, 1955, in the amount of $561.99; all of which $561.99 is disallowed by the Court.

XII.

That there is no showing that any patent was ever issued by the United States as to the Hood land after the going into affect of the Act of March 18, 1926, and the title of the Hoods derived only through said conveyance by or for the heirs of Mary Yahimaloo.